UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

NETCHOICE, LLC,	)	
	)	
PLAINTIFF,	)	CASE NO. 2:24-cv-47
	)	
vs.	)	
	)	
DAVE YOST, *in his official capacity as Ohio Attorney General*,	)	
	)	
DEFENDANT.	)	

TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE
FEBRUARY 7, 2024; 9:30 A.M.
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:
Sperling & Slater P.C.
By: Matthew H. Rice, Esq.
55 West Monroe Street, Suite 3200
Chicago, Illinois 60603

Lehotsky Keller Cohn LLP
By: Joshua P. Morrow, Esq.
408 West 11th Street, 5th Floor
Austin, Texas 78701

Lehotsky Keller Cohn LLP
By: Steven P. Lehotsky, Esq.
200 Massachusetts Avenue, NW, Suite 700
Washington, D.C. 20001

FOR THE DEFENDANT:
Ohio Attorney General's Office
By: Julie M. Pfeiffer, Esq.
Stephen P. Tabatowski, Esq.
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

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Proceedings recorded by mechanical stenography, transcript produced by computer.

WEDNESDAY MORNING SESSION

FEBRUARY 7, 2024

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(The following proceeding was held in chambers with Mr. Lehotsky and Mr. Tabatowski present.)

THE COURT: I just wanted to go over the rules of engagement. I think that -- well, let me start off by having you all state your names for the record. Counsel for the plaintiff.

MR. LEHOTSKY: Steven Lehotsky for plaintiff NetChoice.

MR. TABATOWSKI: And Stephen Tabatowski for the defendant, Yost.

THE COURT: Mr. Tabatowski, you didn't argue. It was Ms. Pfeiffer who argued the TRO; is that right?

MR. TABATOWSKI: That's correct.

THE COURT: Were you here, though, for the --

MR. TABATOWSKI: I was, Your Honor.

THE COURT: If any of this is redundant, just please forgive me. What I always want to do for my oral arguments is go over some really basic rules for engagement. I do that at the risk of being called Captain Obvious, but you would be amazed at things that happen in the heat of argument.

So my primary rule for oral argument is please answer the question as asked. And I know that that's counterintuitive

for most of us as litigators because we want to answer the question our way, and there's nothing wrong with that. I want you to answer the question your way so long as you're answering the question as asked.

The reason is twofold. First, I ask the question not to exact a concession but to fill in gaps in my knowledge. Sometimes even the best written briefs will leave gaps in a judge's knowledge because you know what you're saying. I may not know as well what you're saying.

And secondly and importantly to the advocates, my questions are also an opportunity to persuade. And if you don't answer them, then that redounds to your detriment in every case.

So I just -- and here is my deal with the advocates. In exchange for you answering my questions as asked, I will always, always, without exception, give you a chance to elaborate on the answer that you wish you could have had an opportunity to give if the question had been phrased differently. So you're still going to get a chance to make the statement or make the argument that you wanted to make, but I need, first, my question answered. Sometimes my questions are yes or no questions. And even if it is, I'm going to give you -- unlike a witness on cross-examination, I'm going to give you an opportunity to elaborate on the yes or no. But I'm going to great pains to make you know that I'm not exacting

concessions, but I'm just trying to fill in gaps in my knowledge in giving you an opportunity to persuade.

The other thing I wanted to talk about was I would appreciate it if you would structure the argument along the lines of the four PI factors. We all understand that the most important one certainly in this case is the likelihood of success on the merits. The public interest, the balancing of harms, you know, I can appreciate how they might be left at the end, if we get to them at all. But more significant arguments will center on the likelihood of success on the merits.

Mr. Lehotsky, are you going to move for a merger with the trial on the merits?

MR. LEHOTSKY: I know we had previously discussed whether to merge briefing. And I think we had decided not to do that. But what would the position of Ohio be on merging the merits at this stage for the argument?

MR. TABATOWSKI: We're in agreement to not consolidate at this point. And I believe Your Honor's orders made it pretty clear that had to be preserved in the initial motion or -- excuse me, memorandum in opposition of the reply. We didn't do so for that reason.

MR. LEHOTSKY: We do not intend to move --

THE COURT: That's fine.

Did either of you plan to spend an appreciable amount of time on the standing argument, Mr. Lehotsky?

MR. LEHOTSKY: I was only planning on addressing it if Your Honor has question.

MR. TABATOWSKI: Likewise, Your Honor, with the exception of yesterday's filing, would stand on our briefs in terms of standing but maybe briefly address the -- how we see that supplemental evidence is impacting standing.

THE COURT: All right. I'm fine with you standing on the briefs with respect to standing. That's awfully phrased. But that's fine with me because I do think we have a lot to talk about with respect to the likelihood of success and the various First Amendment arguments, your argument as to whether this is really an action in contract and not really a First Amendment action, but those issues, void for vagueness, et cetera.

How much -- I did not, I don't believe, in my order include a specific time because, at the time, I didn't know whether there would be witnesses, whether it would be more an evidentiary hearing or oral argument. But I was thinking 30 minutes per side. Would that be adequate for you, Mr. Lehotsky?

MR. LEHOTSKY: Yes, Your Honor.

THE COURT: For you, Mr. Tabatowski?

MR. TABATOWSKI: Yes, Your Honor.

THE COURT: Tabatowski.

MR. TABATOWSKI: Well done. And, yes, Your Honor.

THE COURT: When you grow up with a name like Algenon, you work hard to get people's names right.

MR. TABATOWSKI: I bet you're a good speller too.

THE COURT: I'm decent in that regard.

Mr. Lehotsky, you may reserve time for rebuttal, whatever you think is appropriate.

MR. LEHOTSKY: Okay.

THE COURT: And since I had allotted pretty much the day because I did not know whether there would be an evidentiary aspect of this hearing, if we run over a few minutes because I may have a few more questions, that's not going to be the end of the world.

MR. LEHOTSKY: That's right.

THE COURT: Any questions for me before we begin?

MR. LEHOTSKY: No, Your Honor.

MR. TABATOWSKI: No, Your Honor.

THE COURT: Thank you very much.

(End of chambers conference.)

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(The following proceeding was held in open court.)

THE COURT: Good morning. Ms. Stash, would you please call the case.

THE DEPUTY CLERK: Case No. 2:24-cv-47, NetChoice LLC versus Dave Yost in his capacity as Ohio Attorney General.

THE COURT: Would counsel please identify themselves

for the record beginning with counsel for the plaintiff.

MR. LEHOTSKY: Steve Lehotsky for plaintiff NetChoice, Your Honor.

MR. MORROW: Josh Morrow for plaintiff NetChoice.

MR. RICE: Matthew Rice for plaintiff NetChoice.

THE COURT: And counsel for the defendant.

MR. TABATOWSKI: Stephen Tabatowski for defendant Dave Yost.

MS. PFEIFFER: Julie Pfeiffer for Dave Yost.

THE COURT: Thank you. Mr. Lehotsky, this is your motion for a preliminary injunction. Are you ready to proceed?

MR. LEHOTSKY: Yes, Your Honor.

THE COURT: Please proceed.

MR. LEHOTSKY: Thank you.

THE COURT: Mr. Lehotsky, do you know, of the 30 minutes that you have for argument, how much time would you wish -- do you wish to preserve for rebuttal?

MR. LEHOTSKY: Your Honor, I'd like to reserve five minutes, please.

THE COURT: All right.

MR. LEHOTSKY: Good morning, Your Honor. May it please the Court, Steven Lehotsky on behalf of NetChoice.

I know the Court has already read the briefs, and we've already had an oral argument on the motion for a temporary restraining order. I'm happy to take Your Honor's questions at

any time. If you don't have any questions at the outset, I'll proceed to discuss first the merits, the likelihood of success argument, then irreparable injury, and then finally the balance of the equities and public interest factors that I'll group together at the end.

THE COURT: Please proceed.

MR. LEHOTSKY: Thank you, Your Honor. Under *Brown v. Entertainment Merchants Association*, Ohio's parental notification by Social Media Operators Act is plainly an unconstitutional restriction upon minors' access to protected Internet speech. There is a sentence in the defendant's brief that I want to highlight. I believe it's on page 19. Quote, "Should a parent consent to his or her minor child engaging with certain Internet operators, the Act," that is to say, the government, quote, "allows it," end quote.

If you replace engaging with certain Internet operators with buying a violent video game, that's the *Brown* case.

For three different reasons we think Ohio's Social Media Act is unconstitutional. First, notwithstanding its name, Ohio's law applies to myriad Internet websites beyond just the well-known social media businesses, the six that are targeted in the different studies submitted by the defendant. As Attorney General Yost stated publically just before Christmas, Ohio's law applies to, quote, "much more than traditional social media companies," end quote. The Act would

significantly restrict minors' abilities to speak, hear, otherwise engage in speech on the Internet with countless websites, an enormous number of message boards, chat rooms and Internet forums; for example, educational sites such as Blackboard, Canvas and Moodle; gaming sites such as PlayStation Plus, Steam, Xbox Live; general interest such as Medium, Imgur, Substack; informational sites such as Quora, Stack Overflow, and TripAdvisor. And the definition also expressly includes message boards. So the Act reaches discussion forums that focuses on every conceivable topic.

THE COURT: Mr. Lehotsky, the Act, which resembles legislation enacted in other states, seeks to require certain website operators to obtain parental consent before allowing an unemancipated child under the age of 16 to register or create an account on the various platforms. The attorney general maintains that this is really an act that -- this is an action that deals with contract and not the First Amendment.

So, as a threshold matter, Mr. Lehotsky, would you address whether we're really dealing here merely with a contract issue, or are we dealing with a First Amendment issue in its most pristine form?

MR. LEHOTSKY: I believe we're dealing with a First Amendment issue in its most pristine form, Your Honor, because our members' websites, all they do is speech. This is not the type of regulation that you would have where speech is

incidental. Speech is all that we do. By saying they are regulating a contract in order to have access to speech, that necessarily regulates speech.

And I would say that what the State is doing is not really regulating the process of contracting; instead, it's controlling access to speech. I think this is laid clear by Section 1349.09(E) which we cited in our briefs, which is that the text of the Act unambiguously requires websites to deny both access to and use of any website any minor under the age of 16 who lacks parental consent.

This is just clearly regulating the ability to engage in speech directly. It is not a pure economic contract regulation. It is not something that's incidental to speech. And I think the *Brown* case highlights this. *Brown* would not have turned out differently if the state of California had purported to regulate the contract for purchasing a video game, whether the minor would go to GameStop and buy the video game or, more likely these days, go online and enter into an online contract, a license to play the video game on your Xbob or Nintendo Switch or whatever it is. It would not have come out differently if that was what California was purporting to do. The reason is there is no contract exception to the First Amendment.

The attorney general does not have any cases, I think, that supports the type of restriction access to speech that the

State of Ohio is imposing here. They certainly don't have any case that would support the type of consent-based and speaker-based exceptions.

THE COURT: What about a variation on the theme, though, where the Act -- any effect that the Act has on the -- on First Amendment rights is really incidental to the primary purpose of protecting Ohio's youth?

MR. LEHOTSKY: So I don't believe it's incidental at all, certainly for our members who have a First Amendment right to publish and disseminate non-obscene speech to minors and to adults. This law directly burdens their ability to do that. They either have to get parental consent or they have to close down access to the website.

Our member Dreamwidth, for instance, the declaration from Ms. Paolucci makes this clear that for a small website like Dreamwidth which is clearly covered by the Act, they have no ability to comply. Because of the breadth of this law, there are a myriad of websites out there that will either be faced with shutting off speech for minors or taking other more drastic actions that could affect access to adults.

That's not an incidental effect on our First Amendment rights. I also think it's not an incidental effect on the First Amendment rights of minors, of those children between the ages of 13 and 16 who would not be able to access all of the sites I mentioned earlier in my presentation unless they have

parental consent. This is far from an incidental burden upon both our members' First Amendment rights and the First Amendment rights of minors in the state of Ohio.

THE COURT: Do minors enjoy the same level of First Amendment rights as do adults, Mr. Lehotsky?

MR. LEHOTSKY: No, Your Honor.

THE COURT: If that is the case -- because I know that you can envision that minors aren't permitted -- and there will be a justification for minors to be restricted from watching porn, for instance. We would all agree to that. And adults are not restricted from watching porn.

If the Act were just designed to prevent them from watching porn, we probably wouldn't be here. You would agree with that, I'm assuming?

MR. LEHOTSKY: That's correct. Certainly my client would not be here. I would not be here.

THE COURT: That's right. By the same token, can't the State take the same steps to regulate what minors are exposed to if the State has data that these minors are being exposed to websites that are bad for minors? They might have things that are addictive, things that are -- you know, some chat rooms that might have nefarious content, might even have pornographic content. So the fact that it may have an effect on minors in that they can't see it and an incidental effect on adults, is that permissible under the First Amendment, as you

see it?

MR. LEHOTSKY: No, I don't believe so.

Under *Brown* -- so *Brown* expressly rejects that sort of broad, kind of free-floating interest. In *Brown*, the Supreme Court wrote, quote:

"A state possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed."

Certainly, there are some categories. There is a well-established category of speech that is obscene as to minors. Playboy would not be obscene for adults but it is for children for -- you know, under the age of 18. There are certainly some categories where, yes, if the State could establish some very, you know, well-grounded evidence and a narrowly tailored statute to address a particular type of speech and say this is obscene as to minors, perhaps. But the Supreme Court rejected that in *Brown*.

That was the exact argument that California tried, was these video games, the violence. And, in fact, many of the same types of arguments -- the interactive nature of the video games, the way they're first-person shooter games and encourages violence by children, school shootings, et cetera -- the Supreme Court rejected those arguments just as we think *Brown* would reject the arguments about things such as the

infinite scroll features and other things of social media that supposedly make social media so pernicious.

I'll point to the declaration of Dreamwidth. Dreamwidth doesn't have those features and yet it is one of the myriad websites that is swept up in this statute. That's true for countless other websites that don't have those same features that Ohio identifies.

The second related point that I wanted to make about Your Honor's question is there's this kind of remarkable sentence in the defendant's brief, again, I believe at page 19. It is, quote, "Should a platform offer content to minors without requiring a contract, the Act allows that too," which I take that to mean that if our members' websites eliminated their terms of service and just said, okay, you know, minors between the ages of 13 and 16, you're free to sign up; just go ahead, sign up for Facebook or Instagram or whatever you want, but, if there's no contractual requirement, then they can just come on the Internet. That proves how completely untailored this statute is.

Our terms of service for our members contain all sorts of features, anti-bullying, anti-harassment requirements, requirements that you can't post pornography. If what the State of Ohio is trying to suggest is that our members could get around this law by eliminating all of those prohibitions that our members currently place on minors getting access to

websites, I mean, that would be remarkable. It would completely undermine all of their own goals. I don't think the State of Ohio wants 14- and 15-year-olds engaging in more bullying behavior and with our websites unable to do anything about it.

It's, again, just one of the ways in which this purported attempt to regulate contracts where they never identify in the statute what the offending features of the contract are, what the problems with the terms of service are, this is not remotely tailored to addressing that contractual problem which the attorney general identifies.

THE COURT: And under the attorney general's theory, under that theory that this is regulating the process of contracting, that would bespeak a content neutral regulation that would require intermediate scrutiny. Wouldn't that be correct? If the Court were to accept the State's argument, wouldn't that allow me to apply intermediate scrutiny to the Act to determine its constitutionality?

MR. LEHOTSKY: So I think we have an argument that we have preserved in the briefing, Your Honor, that if this is a parental consent requirement, it is categorically unconstitutional under *Brown*. I don't think Your Honor needs to reach that.

THE COURT: My question was slightly different. If I accept the State's proposition that this is an act which

regulates the process of contracting, then I evaluate the Act using the intermediate scrutiny standard as opposed to strict scrutiny if it's not content neutral of which you're arguing.

MR. LEHOTSKY: Are you asking me to assume that the statute is content neutral?

THE COURT: Yes. Because that is what the State is arguing. The State is arguing that the statute is content neutral. They're arguing that this is really about regulating the process of contracting, not about regulating speech. It's content neutral. If that is the case, then the level of scrutiny is intermediate, correct?

MR. LEHOTSKY: Yes, Your Honor. If you assume --

THE COURT: All right. I'm not assuming --

MR. LEHOTSKY: If you reject our arguments.

THE COURT: I'm not rejecting your argument. I'm just saying that that would be one of the consequences, if you will, were I to accept the argument that this is a contracting statute.

MR. LEHOTSKY: Yes, that's correct. It would then be subject to intermediate scrutiny. We still think, as we argued in our brief, that the statute would fail intermediate scrutiny even in that situation because it is overinclusive and underinclusive for the goals it purportedly sets out of protecting minors from harmful speech conduct on the Internet and then also facilitating parental controls and parents'

controls of their minor children's social media. We still think it fails for lack of tailoring. We also think that it doesn't satisfy *Brown* because it doesn't advance those goals in any respect.

We argued in our briefing that Ohio hasn't identified a problem where the government is the necessary solution through a statute like this. We identified all sorts of less restrictive alternatives, other things that the State of Ohio could do to try to improve parents' ability to control their children's use of social media and the Internet such as public education campaigns, advertising, all manner of things that the State of Ohio could do through government speech and through government action to try to encourage better parental monitoring of their kids' social media use before you get to sort of a categorical access ban on a wide swath of the Internet even if it is content neutral.

THE COURT: All right. Please continue, Mr. Lehotsky.

MR. LEHOTSKY: Thank you, Your Honor.

So I would be happy to take Your Honor's questions about whether it is content-based or speaker-based. As I think we've argued in our briefing, for three reasons we think it's clearly a content-based statute, first, because of the nature of what it's targeting, targeting speech that children are reasonably anticipated to access, websites that have subject matter or content such as animated characters or celebrities that appeal

to children. That, just by definition, is a content-based definition about the scope of the Act and what type of websites it applies to and what types it doesn't.

It also contains two exceptions, one for reviewing products that are offered for sale by Internet commerce. If you're reviewing a product, you're exempt. If you're reviewing film or music or a service and a trip, then you're not.

And second, there's this exception for an established or widely recognized media outlet so that if you are NBC through its Hulu service, you're exempt, but YouTube is not. And so we think under well-established Supreme Court precedent that makes this a content-based statute subject to strict scrutiny. And for the reasons I provided on intermediate scrutiny, it wouldn't satisfy that.

It's also speaker-based. And the attorney general says it's, quote, "justifiably speaker-based," end quote.

THE COURT: It's justifiably speaker-based, the attorney general argues, because it doesn't disfavor particular communicative content. At least that's how I interpreted the State's.

Why does it not disfavor particular communicative content, Mr. Lehotsky?

MR. LEHOTSKY: I think that's wrong because it does create this exception for communicative content about product reviews. So that's favored content whoever the speaker might

be. And then also it has the news exception, the established and widely recognized media that's reporting on current events and news. And so, again, you know, these are clearly content-based.

It's a little circular when we say it's content-based, the attorney general says no, no, no, it's speaker-based. And then the attorney general, at least initially, tries to say, no, no, no, it's not speaker-based, it's kind of based on what the content is. We think that doesn't work.

THE COURT: A 15-year-old could theoretically get his news from the NYT but -- without being a part of this contract but could not get his news from TikTok without the contract.

MR. LEHOTSKY: Correct. Correct, Your Honor.

And the *New York Times*, just like many of these websites, has its own term of service with a term of sale, a privacy policy that explains how that particular website can monetize the data that it gets about its readers and subscribers, the same thing that a website like Facebook or YouTube has. You're going to also see that on *New York Times* and ESPN and all of these other websites, and yet the states want to regulate these bad contracts, these bad terms of service that allows these websites, our members' websites, to monetize the data of minors but they don't do anything about other websites.

I know they rely a lot upon *Turner* -- thank you, Your

Honor. They rely upon *Turner* to say that this law is justifiably speaker-based. But *Turner* was a statute dealing with regulation between different or across different types of media: broadband Internet versus classic distribution, cable versus broadcast TV.

Here what we have are speaker distinctions within the same medium of the Internet and websites. And some websites are favored by Ohio and others are pushed out. And we submit that's really because of the ability of our members to publish and disseminate speech and to engage in speech with minors in Ohio which we have an absolute First Amendment right to do. They say there's no right to an audience of your choosing. We think that is totally wrong. Again, *Brown* says that is categorically false. We think we do have a well-established right to disseminate speech. That's established in cases like *303 Creative* most recently, and it's up before the Supreme Court right now as well.

The final aspect --

THE COURT: On that one point, let me pose this question to you. And I -- it's a question that I would pose to Mr. Tabatowski. That is, these websites are either likely or unlikely to be accessed by children because of their content, and, as a result, the language distinguishes between speakers on the basis of content; is that right?

MR. LEHOTSKY: I think that's right, Your Honor. For

instance, some websites imagine a very boring, dry, academic website. Maybe everybody has their own version of what's dry and boring. Imagine that it might be accessed by adults in that field who have a Ph.D., unlikely to be accessed by children. This also goes into the vagueness concern that we have. And that's my final point on the merits before proceeding to irreparable injury. But there are a lot of websites that are at the margins, and there are a lot of websites that might have questions as to whether they're reasonably likely to be accessed by children.

Certainly there are going to be some cases that are easy: Disney Kids website or maybe Disney in general, likely to be accessed by children. For a lot of others, whether children will access them, whether a website has to comply, these are going to be hard questions. That's just one of many examples of vague, unusual.

In our briefing we highlight the established and widely recognized media outlet which, as far as we can tell, is a phrase that exists nowhere on the Internet except with respect to this bill. It's very hard to understand what some of these provisions are. The State points out there are no criminal penalties, which is, admittedly, a relief, but it doesn't save the statute from vagueness defects. That's what the Court in *Griffin* in Arkansas found, and we think this is a statute that suffers from the exact same type of vagueness problems.

I would note the chief justice of the United States in I believe it was 2010 said that courts must issue the rough and tumble of factors in trying to identify First Amendment rights. This is an area where you absolutely have to have clear guidance about what's covered and what's not so that it doesn't chill First Amendment rights.

With respect to irreparable injury, the State has made the argument that we don't have any First Amendment rights that are being chilled here. We think that's virtually wrong. Again, it's disproven by our declarations, the declaration from Mr. Szabo of NetChoice and then our two member declarations, especially the Dreamwidth declaration which establishes the chilling effect that I identified at the beginning. That injury happens immediately if this law is allowed to take effect and can be enforced against our members.

The State has also never provided any answer to our argument that there are compliance costs that have to begin immediately if this law is taking effect and can be enforced. Those compliance costs are unrecoverable. We can't get that money back from the State. We can't get that money back from anyone else. In our declarations we identify those costs will be substantial for a company like Dreamwidth. It might be existential. Even if it's only a dollar, it's still irreparable injury and still money that we will never get back.

The final point that I would make is with respect to the

risk of penalties here. As we noted, the penalties are very severe, potentially running to millions of dollars.

THE COURT: There is a safe harbor provision.

MR. LEHOTSKY: There is only for companies that are in, quote, "substantial compliance." There is no guidance on what that means, what's substantial when you're talking about the scale of the Internet. There's nothing in the statute that provides any comfort around that. There's nothing from the attorney general that provides any comfort around that. So even that 90-day cure period that would apply only for a company that is in substantial compliance isn't any comfort to someone, especially someone who is trying to figure out what to do now about providing access to minors, about restructuring their website, doing all the engineering work that's necessary to come into compliance.

THE COURT: One final question, Mr. Lehotsky. How can this statute, based on your theory of the case, be tailored to be saved to meet the State's legitimate interest in protecting youth, unemancipated youth?

MR. LEHOTSKY: I think there is a lot the State would have to change with respect to this particular statute.

THE COURT: Just limit it to -- limit the answer to narrow tailoring.

MR. LEHOTSKY: With respect just to narrow tailoring -- so, for instance, there is no tailoring at all

about the types of terms of service provisions that are offensive to the State of Ohio that Ohio finds problematic. The statute applies to any contract. If it's a term of service, it's covered by the Act regardless of whether the terms are anti-bullying, anti-pornography, whatever those terms are. So there's nothing in the statute that limits the types of contracts that the State is trying to address with respect to its -- what I'll call its sort of terms of service harm from minors.

Likewise, I think there is a massively overbroad, as I said at the outset, scope to the statute with respect to the other category of injury that I would identify from the State, which is the harm to minors from using social media. As I said, they've got these six websites that they've identified and a couple of academic studies that they've submitted to the Court. There are a myriad, countless websites that don't have any of those features that the State has identified in its briefing that are swept into this act. There are other statutes out there that contain many more exceptions, and that would be one place that the State could start.

But I would say, just sort of circling back around to my initial point, the parental consent provision, I'm not sure there's anything that the State of Ohio could do to get around that. I'm not sure they could tailor their way out of that particular problem.

THE COURT: Thank you, Mr. Lehotsky. You will have five minutes for rebuttal.

Mr. Tabatowski, are you ready to proceed?

MR. TABATOWSKI: Yes, Your Honor.

THE COURT: Please proceed.

MR. TABATOWSKI: Thank you, Your Honor. May it please the Court.

Obviously we are here today on the plaintiff's motion for a preliminary injunction. That being the case, it's the plaintiff's burden to establish their standing. It's the plaintiff's burden to establish that they're entitled to preliminarily injunctive relief based on the four factors. The attorney general believes that they have failed to meet both of these burdens.

With respect to standing, very briefly, the allegations and the evidence simply don't meet the threshold standing requirements under Sixth Circuit precedent for their First Amendment claims, whether it's organizational or associational or prudential standing. Neither can the plaintiffs show they're entitled to injunctive relief based on those four factors. They're not likely to succeed on the merits of either of their claims.

The Act does regulate the conduct of contracting and not content. It should be afforded rational basis review. But even to the extent --

THE COURT: Drill down on that, Mr. Tabatowski. Explain to the Court why you believe that this act only regulates the process of contracting but doesn't regulate speech where you have an act that targets speech providers, if you will. They target platforms. It doesn't target contracts. Its contract is also like a gateway to get to the speech.

I will admit and agree with you that there is a contract that, you know, is sort of the center of this statute, but the contract is just a step that you have to complete to be able to participate in speech activities.

MR. TABATOWSKI: That is true, Your Honor. That is a requirement for the statute to be applicable. But the Supreme Court has rejected the idea that a statute is content-based when it tells an individual or a company what they must or mustn't do as opposed to what they must or mustn't say.

THE COURT: Here is the thing. The Act requires covered websites to deny both access to and use of their platforms if a child doesn't get a parental consent; right?

So why does that not bespeak an act that really is designed to regulate speech?

MR. TABATOWSKI: Your Honor, the attorney general's position would be that the contract is required to access whatever speech may be on these websites. That is true. But, again, denying access without verifiable parental consent in the event of a contract that's required, that's something that

these sites must or mustn't do. It's not compelling them to speak or --

THE COURT: Doesn't it regulate the operators, the operators of these platforms, their ability to publish and to distribute speech to minors and by minors? How is that not so under the Act?

MR. TABATOWSKI: Only if they require minors to enter into a contract in the first instance. But the First Amendment doesn't --

THE COURT: Doesn't it also regulate minors' ability either to produce speech or to receive speech or both?

MR. TABATOWSKI: If there is a contract required to access that speech, then, yes, it would. But the threshold requirement there is still that the definition of operator -- obviously, they have to be a covered operator under the Act, and they have to require a contract for the minor to register or be an account holder. So regardless -- assuming that the speech is implicated, intermediate scrutiny should apply because the statute makes distinctions based on speakers and not on content.

As Your Honor noted in his TRO opinion, the inquiry at its core as to whether a statute is impermissibly content-based is whether the government is regulating because it agrees or disagrees with the message of the speech. There is nothing in the record, in the statute, either textually or implicitly,

that suggests the government agrees or disagrees with any content that's on any of these websites.

THE COURT: Explain this to me. If that is true, why is it, then, that the government will allow a 15-year-old to get news from, let's say, the *New York Times* without having one of these contracts but will not allow a 15-year-old to get her news from TikTok, let's say, or Facebook, without a contract?

MR. TABATOWSKI: Your Honor, it's because the problems that the statute is meant to address from which the State's interest arise are compounding. They build upon each other and cascade in a way that -- for instance, *New York Times*, who may or may not -- is likely not a covered operator, does not meet the four requirements to be a covered operator in the first place. In that scenario, those compounding problems, because they don't meet -- they don't create the atmosphere that those four parts of the operator definition are meant to identify, the problem with its -- the *New York Times*' terms of service don't compound with that atmosphere to create this larger problem and heightened interest of the State.

THE COURT: Well, wouldn't it depend -- I mean, if you listen, let's say, to Fox News, you would think that the *New York Times* would create the kind of atmosphere that parents should keep their kids from looking at. They wouldn't want their kids to look at the *New York Times*, let's say, because it's too liberal. I don't understand what it is about the

atmosphere, how you identify -- let's say Facebook is creating an atmosphere that -- we don't have to use the *New York Times* -- *USA Today* might create because, under the Act, a kid could get -- a 15-year-old could get her news from *USA Today* without a contract but could not get her news from Facebook without a contract.

And many young people today get -- I didn't know this was a thing, Mr. Tabatowski, until I was talking to a law clerk who told me that she got a great bit of her news from Facebook. Because I'm not on Facebook, I didn't even know about that news feature.

But kind of walk the Court through why that is a distinction without a difference.

MR. TABATOWSKI: The difference between the *New York Times* in that scenario, and Facebook, is that covered operators like Facebook that create this atmosphere, there are unique problems and risks associated with that atmosphere posed to minors. You could picture a scenario, sort of to elaborate on those compounding problems, where a minor enters into onerous terms of service with a covered operator, engages with that potentially problematic environment, either harms someone or has caused harm and then is without at least a contractual remedy because even Dreamwidth, who I believe NetChoice sort of advances as having maybe the least onerous terms of service, has a hold harmless and indemnification clause, has choice of

venue, choice of law provisions. So there is a unique problem that covered operators, because by their definition in the Act -- a unique problem because of the atmosphere that they create in conjunction with those terms of service.

THE COURT: Let me cause you to go on a degression for a moment so that at least it will be clear in the Court's mind of which you speak. Because you referenced maybe now three times about the atmosphere that some of the covered sites creates, and the implication is that it's a negative atmosphere for the youth of Ohio, the unemancipated youth of Ohio.

Tell me about the atmosphere of which you speak in which the Act is trying to address, and the factual or evidentiary basis for your belief that said atmosphere is harmful to those 15 and under.

MR. TABATOWSKI: Yes, Your Honor. I start with the State's Exhibit B, the surgeon general report which states that social media platforms' covered operators are often designed to maximize user engagement that encourages excessive use, behavioral dysregulation. And this atmosphere is created irrespective of content. It's created by things like push notifications, infinite scrolling and algorithm sorting. This is regardless of what the message is. It's more akin to *Turner*. It's more akin to a particular type of technology where this distinction lies. It's not a content-based distinction. It's based on this particular form of technology,

in addition to things like peer-to-peer chatting, end-to-end encrypted chatting which essentially means, Your Honor, that once these private chats happen on these platforms, no one has access to the content of that chat other than the minor and the potential sexual predator, for instance.

So those are the type of non-content-related environments that are created by these sites which are compounded by the fact they require these contracts and do seek to enforce them against minors. That's the compounding sort of problem from which the State's interest arises.

THE COURT: All right. I appreciate that. That gives me context. So thank you.

MR. TABATOWSKI: You're welcome, Your Honor.

THE COURT: Please continue with your argument.

MR. TABATOWSKI: Yes. So, again, the *Turner Broadcasting Systems*. If the Court is not inclined to accept the State's argument that this is a purely contractual statute not regulating speech, *Turner Broadcasting* held that the must-carry rules are distinguished between categories of speakers based on the technology used to communicate.

That's what we have here. There, intermediate scrutiny applied because the regulation distinguished based only on the manner in which the speakers transmitted their message to viewers. Again, it's the manner in which covered operators, by definition, who target children or reasonably anticipated to be

accessed by children, transmit messages to those children.

Regardless of which standard Your Honor chooses to apply to this statute, it survives constitutional scrutiny. The government has those intertwined compelling interests which compound upon each other and cascade into this sort of larger interest. The Supreme Court has found a compelling interest in protecting the physical and psychological well-being of minors. It's also well established that parents have a fundamental right to control their children's upbringing.

We heard my friend Mr. Lehotsky speak a little bit about *Brown* sort of vitiating that idea, and I don't think the *Brown* opinion, particularly footnote 3, goes that far. I believe it's a little bit more limited than that because I think *Brown* is pretty easily distinguishable if one looks at the statute in *Brown*. It was obviously a moral judgment by the California legislature on content. It essentially took the obscenity test and put in violence words. That's an express facial content-based regulation. We don't have that here.

THE COURT: But *Brown* also stands for the general proposition that the State doesn't possess a, quote, "Free-floating power to restrict the ideas to which children may be exposed." And *Brown* was dealing with something arguably more compelling because it was dealing with violence and certainly violence in an atmosphere where we routinely have acts of violence perpetrated against vulnerable victims like

elementary school children or school children generally.

So, if the Supreme Court did not find that the statute in *Brown* passed constitutional muster, then, *a fortiori*, shouldn't I find that this statute doesn't pass constitutional muster?

MR. TABATOWSKI: Two points on that, Your Honor. First, the State would agree there isn't a free-floating interest in restricting the content that minors are able to access. And that's exactly why, Your Honor, that a minor might access a news article on the *New York Times* but not on the platform by a covered operator where that atmosphere is created.

The second point is that that's -- I think Your Honor would maybe be applying Justice Alito's dissent in *Brown* in that the reason that *Brown* ended up deciding the way it did was because there's no historical aspect of the First Amendment where violence is an exception. On the other hand here, there are many examples where contracts and conduct that minors wish to engage in, states have required parental consent.

THE COURT: But what if I look at this as not a contract case but a First Amendment case? What does history dictate in that instance?

MR. TABATOWSKI: Well, I think it's fair to say, Your Honor, that we are dealing with sort of a rapidly changing new ground.

THE COURT: If you are an originalist, where do you go to find an answer to the questions posed in this case since the framers of the Constitution didn't have these social media platforms to consider then? If you're a living constitutionalist, however, a law professor Strauss, then perhaps we can find a way to address that question.

And that's going to be a question for you, Mr. Lehotsky, because I know that you are a witness to the kind of history that I just inquired about as your justice was one of the original originalists.

Go ahead, Mr. Tabatowski.

MR. TABATOWSKI: Yes, Your Honor. I would say that if you're viewing it as a speech case, then, for instance, entering into a contract to get a tattoo obviously are, quite arguably, expressive conduct. But there are non-content-related aspects to getting a tattoo that the State has an interest in requiring parental consent to: permanence, health and safety risk.

THE COURT: My question was slightly different. *Brown* relied on a historical context vis-à-vis the First Amendment. But can we find the same historical context for the Act in this case upon which this Court could rely for guidance?

MR. TABATOWSKI: In the context of the Internet, no, I don't believe so, Your Honor, because this is pretty new ground.

THE COURT: Right.

MR. TABATOWSKI: Which is why the caution should be used in terms of applying cases about violent video games as sort of a monolithic object of speech, of content. Holdings in cases regarding a violent video game are just not applicable to social media which is a broader -- it's just a different thing than an object of speech or content. So we are treading new ground here and it's worth another look, I believe.

Returning to the government's interest, if I may, Your Honor.

THE COURT: Yes.

MR. TABATOWSKI: The -- again, the companionship, care, custody, management of one's children is an important interest. It's one that warrants deference. I would again point to the State's Exhibit B, the surgeon general report, which reported that nearly 70 percent of parents say that parenting is more difficult than it was 20 years ago. What are the top two cited reasons? Technology, social media.

Again, in *Brown*, one of the reasons that they found the way they did was because California had not shown that parents had a substantial interest in the assistance of the State.

THE COURT: Is there a way to regulate social media without regulating speech, Mr. Tabatowski?

MR. TABATOWSKI: The State would say it's done it here. But, yes, I believe there is if we focus on these

platforms, these covered operators, not as existing of the content that is on them. They are a separate thing. Again, I believe that's why a minor might access content on the *New York Times* but not on Facebook because of what Facebook is compared to the *New York Times*. I believe that's what the statute is pointed at addressing.

There are just significant specific risks posed by these operators. The surgeon general report again points out that people with frequent problematic social media use experience changes in their brain structure which is similar to changes seen in individuals that have substance abuse problems or gambling addictions.

This is a result of conscious design choices by those operators that we previously discussed. And nearly half of adolescents -- the State's Exhibit B [sic]; it's a Harvard study by Dr. Raffoul -- reports that nearly half of adolescents report being online almost constantly. These habits ultimately are linked to depression, anxiety, and neuroticism in minors. That's regardless of what the content is they're viewing, but it's because of the way the features --

THE COURT: Would the better approach be to restrict minors from being on social media at all? Because you're saying that regardless of the content, the fact that they're on it is what is causing the problems with our youth. So why not just eliminate the problem if it's not the content?

MR. TABATOWSKI: Not every minor is the same. There is good on the Internet and on these platforms.

THE COURT: How do you identify the minors who are going to become depressed as a result of their engagement with social media and those who would not?

MR. TABATOWSKI: The State wouldn't attempt to do that. That's the requirement --

THE COURT: That's something that could be left to parents?

MR. TABATOWSKI: Correct.

THE COURT: Leave it to the parents and the State gets out of the business of trying to regulate content.

MR. TABATOWSKI: Well, Your Honor, I believe going back to that 70 percent of parents have said that these -- that technology and social media are -- make parenting much harder than it was 20 years ago. And, frankly, that's where this case is also different from *Brown*, is that, as opposed to violence or violent video games, parents have identified a substantial need for government assistance in vindicating their rights to control the upbringing of their children.

The State, of course, would -- the statute would be much more constitutionally problematic if the parental consent requirement was not in place because it is leaving that decision with the people that know the minors the best, and that is the parents on a case-to-case basis.

THE COURT: But I find that interesting in light of note 3 that you referenced earlier in *Brown*, that even if, quote, "The state has the power to enforce parental prohibitions," for example, enforcing a parents' decision to forbid their child like to attend an event or something, and I resume the quote, "It does not follow that the State has the power to prevent children from hearing or saying anything without their parents' prior consent."

And then the Court explains further. "Such laws do not enforce parental authority over children's speech and religion; they impose governmental authority, subject only to a parental veto."

That was *Brown*'s concern with respect to your argument. That was the Court's concern in *Brown* with respect to the argument that you're making about bringing in governmental authority to enforce these parental prohibitions.

MR. TABATOWSKI: The difference from the State's standpoint is the law. The law in *Brown* targeted a particular type of speech. It was violence. It was different from --

THE COURT: But here it could be argued that what you're targeting is even broader. *Brown* was targeting violence. You're targeting basically any speech that's on these platforms, right?

MR. TABATOWSKI: No, Your Honor. I believe that we're targeting covered operators who require minors to contract.

THE COURT: You're targeting any speech on these covered operators' platforms. *Brown* was targeting a finite number of entities. They were targeting people -- companies who made these games that were arguably violent.

But, again, they were just targeting the violent video games. They weren't targeting Tetris. Tetris is not a violent game, but they were targeting other violent games. I can't recall whether *Brown* was targeting Mario Brothers. And by my questions, that tells you how old my sons are when I talk about Tetris and Mario Brothers, Super Mario.

Here, you're targeting these operators and all of their content because you aren't allowing them to get onto these platforms without parental consent, which means you can't look at any of their stuff without parental consent but you can look at all of *The Wall Street Journal* stuff without parental consent.

MR. TABATOWSKI: I think the difference goes back to that principle inquiry. Perhaps what Your Honor is getting at is a speaker-based distinction and not a content-based distinction. The State believes that's supported by the fact that you could read -- a minor can read *The Wall Street Journal* article on the journal.com which doesn't meet the definition of a covered operator.

THE COURT: Let's try this one, Mr. Tabatowski. What if *The Wall Street Journal* was doing a historical piece that

covered pornography; and, in the context of the covered piece, it had to discuss and display pornographic images right smack in the middle of the WSJ? That's something that you would otherwise try to prevent by the Act, but, because it was *The Wall Street Journal*, it would fall through the cracks and my 15-year-old son would be able to look at it because it was *The Wall Street Journal* and not Facebook. That would be the only reason. I hadn't given the consent. There was no contract, but he could look at it on *The Wall Street Journal*. What about that?

MR. TABATOWSKI: I think that illustrates that the Acts' arguable speaker-based distinctions are not a proxy for the regulation of content because the State is not saying it favors or disfavors that material. Again, it goes back to those issues as unique risks and problems that are posed by covered operators as defined by the statute, especially ones that target children and obviously those ones that require onerous terms of service. I don't think the statute is underinclusive in that regard because the statute is not targeting content. To the extent it does implicate a minor's ability to access content, it's incidental to those important and compelling interests that the State is seeking to vindicate.

THE COURT: You have two minutes to wrap up, Mr. Tabatowski.

MR. TABATOWSKI: I would note, Your Honor, also that the Act targets a very narrow age window because there are existing federal protections in the form of COPPA, at least for privacy. Many of NetChoice's members, by their own allegation, do not allow minors under the age of 13 to access their websites. So primarily and practically, Your Honor, we're talking about a narrow age window and one that the State's evidence has shown, Exhibit C, windows of developmental sensitivity to social media, that between the ages of 11 to 15 are when adolescents are at the highest risk of these problems.

I'd like to briefly touch on void for vagueness. The standard there is whether a reasonable person would understand whether the statute applies to them and the conduct that it prohibits. And the State believes that the statute is clear to whom it applies, that's social-media-defined operators who target children or reasonably anticipated to be accessed by children.

I would note that one of the factors in the 11-factor list that the plaintiff takes issue with is --

THE COURT: How is reasonably anticipated to be accessed by children defined?

MR. TABATOWSKI: I think as it's commonly understood. I believe we --

THE COURT: It's not defined in the statute, is it?

MR. TABATOWSKI: No. Well, it's not defined, but the

contours are outlined by those factors.

THE COURT: Is targeting -- the phrase target children defined anyplace in the Act?

MR. TABATOWSKI: No. But, again --

THE COURT: Again, we know it's children under the age of 16.

MR. TABATOWSKI: Correct.

THE COURT: Or 16 and under.

MR. TABATOWSKI: Under the age of 16.

THE COURT: Under the age of 16.

But what does targeting children mean? What does to target children mean?

MR. TABATOWSKI: I believe that --

THE COURT: I'm not asking you what -- and I don't mean this in a facetious way, Mr. Tabatowski, because you've done a marvelous job of answering the Court's questions. I want to know not what you think because you're in the AG's office. But, if I'm an operator, I might not be able to call you. You might be engaged in an argument before this Court; so I can't call you and find out what this targeting children means. The operator should be able to find out in the statute what targeting children means.

So, if I'm an operator, how would I understand or where would I go to find an understanding for what the phrase targeting children means?

MR. TABATOWSKI: Again, I believe you can look at Subsection C of the statute and the 11 factors, particularly for, let's say, Dreamwidth, for instance, who purports to collect the least amount of data, according to their terms of service in the evidence that plaintiff has provided. Factor 10 is empirical evidence regarding audience composition. Dreamwidth admits they have that. They know whether or not they target children. They have empirical evidence, and the statute expressly sets forth that the attorney general and the courts can consider that.

So sort of colloquially, in a general understanding, targeting children is what those 11 factors are meant to illustrate.

THE COURT: It's interesting that you raise the 11 factors, Mr. Tabatowski, because the -- that's the 11-factor list that, under the statute, the attorney general or the Court may use to determine if a website is indeed covered. Have I gotten that right? Isn't that what it is?

MR. TABATOWSKI: The 11 factors go to whether a website targets or is reasonably anticipated to be accessed.

THE COURT: It's true that under the Act the attorney general or a court -- the Act says that may use this 11-factor list to determine whether the website is indeed covered, right?

MR. TABATOWSKI: Correct.

THE COURT: Okay. But nowhere in the Act does the Act

define the 11 factors. It lists the 11 factors, but it lists them without definition. Again, to the Court, that is of great concern in terms of whether this act is void for vagueness. Is there -- do you have any understanding as to each of those 11 factors without resort to some definition? Because sometimes language -- the beauty of language is that it can be precise, but the beauty of language is also that it can be subject to multiple interpretations. So what one of the terms means in SoCal may be different from -- strike that.

What one term might mean to one operator might mean something different to another operator. A California operator might view one term different than a Montana operator, for instance. We're that diverse as a country. And the operators, I believe, are worldwide operators; so they would need -- they have been given permission to do business in the state of Ohio, for instance. So they have to understand what those terms mean here or what those terms meant when the legislature enacted them. How are they to understand what those terms mean without a definition within the statute?

MR. TABATOWSKI: Your Honor, again, I think the standard is whether a reasonable person would understand what these words mean. And we can't expect -- as you noted, language can be ambiguous or vague and it can be very precise. But the Court has held that mathematical certainty in drafting legislation is not required. The standard is whether a

reasonable person would understand whether or not they target or reasonably anticipated to be accessed by children. And those 11 factors, though they are not defined, the State's attempt to set the contours of that -- I would note, Your Honor, that -- I'd like to briefly address the evidence that was submitted yesterday.

Some of NetChoice's members support the Kids Online Safety Act which has very similar language --

THE COURT: Are you talking about the Children Online Privacy Protection Act?

MR. TABATOWSKI: No. This is a bill. It's not been enacted yet. It's detailed in that filing from yesterday, Your Honor.

THE COURT: I have it.

MR. TABATOWSKI: The footnote, I believe it's the second footnote there --

THE COURT: Yes. Number 2.

MR. TABATOWSKI: X, which is a NetChoice member -- there's one other that's slipping my mind currently, Your Honor, but they acknowledged support for this statute. So it has a very similar standard without factors to determine whether it's -- essentially it's whether it's reasonably anticipated to be accessed by children. So I don't think that NetChoice or its members should be able to hide under a umbrella.

THE COURT: I want to make sure I understand what your argument is with respect to this footnote. Because it says the Kids Online Safety Act would generally apply to covered platforms defined as a social media service, social network, online video game including educational games, messaging application, video streaming service, or an online platform that connects to the Internet and that is used, or is reasonably likely to be used, by an individual under the age of 17.

So there is a definition of covered platforms. So let me juxtapose that to the Act under consideration here where the Act contains an exception for, quote, "established" and, quote, "widely recognized," quotes closed, media outlets whose, quote, "primary purpose," is to, quote, "report news and current events," quotes closed. But the Act doesn't provide any guardrails or signposts for determining which media outlets which are, quote, "established," and, quote, "widely recognized," quotes closed.

My kind of Pavlovian response to that type of language is that it invites arbitrary application of the law. But at least KOSA, the Kids Online Safety Act, seems to define covered platforms. So that juxtaposition confuses me in the context of your argument. Can you, as a parting argument, as your final argument or final statement, just clear up that confusion in your Court's mind?

MR. TABATOWSKI: Two points on that. The first is that I was sort of in the realm there of whether a website is reasonably anticipated to be accessed by children and comparing that portion of the statute with KOSA which has very similar language in terms of what might be reasonably accessed by children but doesn't provide factors yet. Some of NetChoice's members support the Act and obviously know that it applies to them.

With respect to the exemption, Your Honor, I believe that you can sort of read the exemption as -- allow me to find it.

THE COURT: 1349.09(O)(2). That's where the exception resides.

MR. TABATOWSKI: The exemption, Your Honor, it provides widely established and recognized I believe it's sort of factors to be considered and whether a media outlet's primary purpose is to report the news. So, to that extent, I believe there is some indication within that subsection itself that guides that sort of definition.

The second point there is that that language is contained in a discrete exemption which may or may not have much applicability at all because most of those websites that may or may not fall under that exemption would not be covered operators because they wouldn't meet those four definitions.

The State's final point is that if the Court is inclined

to find that that limited exemption is impermissibly vague, it shouldn't let that vagueness in that exemption infect the rest of the statute. And that statute can be severed -- or excuse me, that exemption could be severed from the rest of the statute which the State maintains is --

THE COURT: And just for clarity of the record, what I call an exception, that is, established and widely recognized, you're calling an exemption, but we're both talking about the same thing.

MR. TABATOWSKI: Correct. Yes.

THE COURT: Thank you, Mr. Tabatowski.

MR. TABATOWSKI: Thank you, Your Honor.

The State --

THE COURT: Before you begin your rejoinder, Mr. Lehotsky, I need just one second.

Mr. Lehotsky, your retort.

MR. LEHOTSKY: Thank you, Your Honor.

I know Your Honor had a question about originalism. I'm happy to begin there. I've got, I believe, six different points to make. But if you'd like me to begin --

THE COURT: I'll tell you what. You can begin there just because, in theory, at least, it will give me a structure, or it will give me your insights on a structure within which to approach this issue and opinion because I think that Mr. Tabatowski was correct. I don't think you would disagree

that *Brown* could resort to the history -- could resort to the kind of historical analysis that many originalists would find necessary in considering whether the Constitution forbade this or the First Amendment forbade this. And the framers could not have imagined -- even Ben Franklin would not have imagined the Internet and social media. He was probably the most forward-thinking tech person of that era.

MR. LEHOTSKY: I think someone who is an originalist would approach the question by saying what do the phrases the freedom of speech and I think also the freedom of the press mean? What do those phrases mean at the time of founding? I think whether you apply that framework or a living constitutionalist framework, you sort of get largely to the same place.

I think the question of what does the freedom of speech mean at the founding, at the time of the founding there were things like paintings and writing and the printing press. That certainly evolved into photographs and radio and television and now the Internet. The Supreme Court has been very clear that sort of technological innovation, when we're still talking about speech, whether it's what I'm doing right now or whether it's writing, whether it's listening in music or recording, all of those just fundamentally go to the freedom of speech however people are communicating in whatever medium without regard to technology.

I think *Brown* is somewhat instructive on this because Justice Scalia's opinion in *Brown* does say I've seen this movie before. Back in the 1950s everybody was scandalized with Elvis on TV swinging his hips. People said we should stop kids from watching television. Same thing with all manner of other communication. Radio is poisoning the minds of children, and now I guess it's things like infinite scroll.

One of the things that -- I keep coming back to this point of sort of favored and disfavored speakers. For some websites, I suppose -- the State of Ohio says Disney, Netflix can serve an infinite number of videos to your children to watch on their sites, but similar video sites, whether it's Facebook or Instagram or YouTube or whoever it is, they don't get to. It's just -- there is a complete lack of fit between the purported goals of the State of Ohio and the statute that they have enacted.

A few more points briefly, Your Honor. The State says that this really is regulating conduct and not content. But their argument that what they're really doing is regulating contract, it just has no limiting principle under the First Amendment. Every type of speech that is available, whether it's for profit or maybe even not for profit, you usually have some type of contract that comes along with it. We gave examples in our briefing about tickets for a concert, a subscription to a newspaper. You could purportedly regulate

all of these things by saying, you know, we're saying kids can't have contracts for, you know, ticket -- for concert sales to go to a concert. All of these would purportedly regulate the contract and not the underlying speech regardless of content.

But this brings me to a second point which is, as Your Honor noted, sort of regulating more broadly when it comes to speech is a vice, not a virtue. The breadth of this statute, the fact that it regulates such a wide swath of the Internet is its primary problem. It does so by drawing certain lines around content and speakers that undermines the State's purported goals.

Maybe just two, I believe, more points in response to the State. First, the -- sorry. I already made that point. Hold on.

With respect to KOSA, I think that's the final point I wanted to make. With respect to the Kids Online Safety Act, this is a piece of hypothetical legislation. It hasn't been enacted. It hasn't passed by either house of Congress. It is a very different law from the one that Ohio has enacted. They do both have parental consent requirements. There are some differences in what those requirements would be.

More importantly, the KOSA is a much narrower bill. I'm not at all saying it's constitutional. I'm not at all saying it's a good thing to pass. But it has the type of provisions

regarding advertising and privacy and default settings and design and parental controls, many of the features that are nowhere to be found in Ohio's act and can be found only in the briefing from the attorney general. All of the different problems that the State has identified in its briefing, those are nowhere in this statute. So this is at least a narrower bill at the federal level. And I think whether there are some members of my client NetChoice that support it is really entirely irrelevant, not at all probative to the constitutional question before the Court.

A company like X, I believe, doesn't even allow minors on the website because X allows pornography. If you're under 18, I don't think you're allowed to sign up for an X account. Likewise, Snap has said it supports it. That's perfectly fine. Member companies are perfectly allowed to enforce whatever legislation they want and to comply with it. I believe Snap has said they're already in compliance. That is not any reason that the State of Ohio gets to impose these types of parental restraint restrictions on the entirety of the Internet, on a vast swath of the Internet, even if there are a couple of companies supporting it.

If there are no further questions.

THE COURT: I have no further questions.

MR. LEHOTSKY: Thank you, Your Honor.

THE COURT: Thank you, Mr. Lehotsky.

Mr. Lehotsky and Mr. Tabatowski, I want to commend you on very well-made arguments on both sides. You were very thorough. You've given the Court quite a bit to think about. Of course, I've done a great deal of background work, and we had the benefit of the arguments on the motion for a temporary restraining order; so I'm far along in this decisional process.

I hope to have a final written decision by close of business on Friday because I want the State to be in a position to do whatever we're going to do, as well as -- I mean, this is a state statute that is under consideration and it deserves all of my complete and immediate attention. So I'm going to try to render a decision as soon as possible without, at the same time, not dotting all Is and crossing all Ts. I want to make sure that this is a thorough analysis to which this is subject, just like all of my cases, but it's with some expedition that I must approach this because it is a state statute and reflects, in some respects, the will of the people as through its legislators.

If there's nothing else -- I take it there's nothing else from the plaintiff, Mr. Lehotsky?

MR. LEHOTSKY: No, Your Honor.

THE COURT: I take it there's nothing else from the State.

MR. TABATOWSKI: Nothing further, Your Honor.

THE COURT: Thank you very much, everyone.

(Proceedings concluded at 11:12 a.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans
Shawna J. Evans, RMR, CRR
Official Federal Court Reporter

February 14, 2024